No. 88-263

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

GENERAL MOTORS CORPORATION,
Petitioner,

v.

SHEILA ANN GLENN, PATRICIA F. JOHNS and ROBBIE NUGENT,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The Equal Employment Advisory Council (EEAC), with the written consent of the parties, respectfully submits this brief as amicus curiae in support of the petition for a writ of certiorari in this case filed by General Motors Corporation.

INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council is an association of employers organized to promote sound practical approaches to equal employment opportunity and

affirmative action. Its membership comprises a broad segment of the private sector business community in the United States, including both individual corporations and trade associations, which themselves have hundreds of employer members interested in the foregoing purposes. The Council's governing body is a Board of Directors composed of experts in the field of equal employment opportunity. Their combined experience gives the Council an in-depth understanding of the practical, as well as the legal aspects of equal employment policies and requirements. The members of the Council are firmly committed to the principles of nondiscrimination and equal employment opportunity.

As employers, EEAC's members are subject to the Equal Pay Act, 29 U.S.C. 206, and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, both of which involve the "equal work" standard established by the Equal Pay Act, which is the basis of the plaintiffs' suit in the instant case. EEAC participated as amicus curiae in the court below in the instant case pursuant to an order of the Eleventh Circuit granting it leave to do so. EEAC also participated as amicus curiae in *County of Washington v. Gunther*, 452 U.S. 161 (1981), one of the major Supreme Court cases construing the Equal Pay Act, its legislative history and its relationship to Title VII.

Moreover, the instant case involves the Equal Pay Act's affirmative defense which allows differentials in pay to male and female workers for doing equal work if the differential is "based on any other factor other than sex." EEAC filed a brief in *Kouba v. Allstate Insurance Co.*, 691 F.2d 873 (9th Cir. 1982), one of the leading cases construing that defense as it applies to an employer's payment of prior wages.

In its decision below, the Eleventh Circuit held that the "factor other than sex" defense did not apply to GM's sex-neutral policy of not cutting the wages of em-

ployees who transfer to other jobs. Not only is this holding at odds with the Equal Pay Act and its legislative history and numerous other cases, the Eleventh Circuit specifically acknowledged that its holding conflicted directly with the Seventh Circuit's decision in *Covington v. Southern Illinois University*, 816 F.2d 317 (7th Cir.), *cert. denied*, 108 S. Ct. 146 (1987). This conflict is of great concern to EEAC's members, most of which—like GM—are large corporations with facilities in many different federal circuits and who must attempt to ascertain their legal obligations in the face of these conflicting Equal Pay Act interpretations.

As GM points out in its petition, this case involves the common employment practice of maintaining the wages of employees who transfer from higher-paying jobs to lower-paying jobs within the same company. Such wage retention practices are not based on sex, but upon valid business-related reasons. The petition lists a number of legitimate reasons for such policies, including:

> to encourage transfers (particularly to supervisory or salaried positions), to maintain employee morale, to enable minority employees to move into jobs with greater promotional opportunities, to develop a more flexible work force with a greater variety of skills, to retain skilled employees who may be needed in the future, to ease the burden on employees during times of economic contraction, and to accommodate workers who are no longer able to perform in their previous jobs.

(Cert. Pet. at 2).

This Court has recognized that courts and administrative agencies are not permitted to "substitute their judgment" so long as the employer's system "does not discriminate on the basis of sex." *Gunther*, 452 U.S. at 171. The Eleventh Circuit's refusal to recognize GM's wage-retention policy as a legitimate "factor other than sex" is of particular concern inasmuch as implementation of such policies often benefits members of both sexes, and

there has never been any finding in this case that the policy was based on sex. The rejection of the affirmative defense in the face of these facts casts doubt on many compensation systems in effect throughout the private sector, and therefore is of great interest to EEAC.[1]

STATEMENT OF THE CASE

In this action, three female plaintiffs alleged that GM violated the Equal Pay Act, 29 U.S.C. § 206(d)(1), by paying them less than it paid male employees for performing the same jobs. They sought to recover the difference in pay and, alleging that the violation was "willful," to apply a three year statute of limitations and to recover liquidated damages. GM contended that the difference in pay resulted from a "factor other than sex," an absolute defense under the Equal Pay Act. 29 U.S.C. § 206(d)(1)(iv).

The sex neutral "factor" relied upon, and the crux of this case, is GM's longstanding, corporate-wide policy or practice of allowing hourly employees with appropriate skills to transfer voluntarily to salaried supervisory and nonsupervisory positions and to be paid a salary at least equal to their prior hourly rate. (R. 6-197-198; 6-82-83).[2]

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[1] EEAC's ongoing interest in such issues is further demonstrated by its previous participation as amicus curiae in several other cases involving claims of sex-based compensation discrimination. *See, e.g., Florida v. Long*, 108 S.Ct. 2354 (1988); *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983); *American Nurses Ass'n v. State of Illinois*, 783 F.2d 716 (7th Cir. 1986); *AFSCME v. State of Washington*, 770 F.2d 1401 (9th Cir. 1985); *Spaulding v. University of Washington*, 740 F.2d 686 (9th Cir. 1984), *cert. denied*, 469 U.S. 1036 (1984); *Lemons v. City and County of Denver*, 620 F.2d 228 (10th Cir.), *cert. denied*, 449 U.S. 888 (1980); *IUE v. Westinghouse Electric Corp.*, 631 F.2d 1094 (3d Cir. 1980), *cert. denied*, 449 U.S. 1009 (1980).

[2] Record (R.) references are to the official record by volume and page. Where reference is to a document, the reference is to volume,

The practice is important to both the employees and management of GM and to employees and employers generally. It allows hourly employees to escape dead-end career paths without a diminution in income (R. 6-207) and encourages the voluntary movement of persons with valuable industrial skills and production experience into supervisory and support positions (R. 5-20; 6-206). These transfers may not be compelled by GM (R. 6-87) under the GM contract with the United Automobile Workers of America ("UAW"). Moreover, in the event of a salaried layoff, former hourly employees may return to hourly jobs. (R. 6-76). Consequently, absent such an income maintenance policy, hourly transfers to salaried jobs would rarely occur. (R. 6-71, 84-85). The income maintenance practice applies to all employees of GM (R. 6-195), including some 18,000 hourly and 3,000 salaried employees of the GM division involved directly in this case. (R. 6-205).

The wage rates for GM hourly employees are established through collective bargaining with the UAW and embodied in a national agreement. Compensation for nonbargaining unit salaried employees is governed by a nationwide "salary administration plan." Neither of the systems was claimed, or found, to be sexually discriminatory. Both systems, and the income maintenance practice, apply in virtually every circuit.

The plaintiffs compared their compensation with that of male employees who, with one exception [3], transferred

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assigned document number and page in the document. "Pet." and "Pet. App." references are to the petition and appendix filed in this Court by General Motors.

[3] The exception was an "outside" hire who had been a vendor of the items he was hired to purchase. He refused to join GM for less money than he was then making. His skills were directly valuable and needed. His hiring was four years after plaintiff Nugent's,

into salaried "followup" jobs from higher paying, hourly production positions governed by the collective bargaining agreement. The plaintiffs had always been under the separate, sex-neutral "salaried employee plan." The court below failed to note that disparities also existed between the plaintiffs' salaries and those of other females who, like the male "followups," had transferred from hourly to salaried jobs.

The Eleventh Circuit affirmed the district court's holding that GM's wage retention policy violated the Equal Pay Act. The court recognized that GM's defense was based on an "unwritten, corporate-wide policy against requiring an employee to take a cut in pay when transferring to salaried positions such as those at issue in the present case." (Pet. App. 6a). But then, citing *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974), (Pet. App. 7a), the court mischaracterized GM's defense as the discredited "market force theory."

The court of appeals forthrightly acknowledged that "our holding may contradict the Seventh Circuit's holding in *Covington v. Southern Illinois University* . . . ." (Pet. App. 9a). There, the Seventh Circuit had approved the university's policy of maintaining income levels upon changes of assignment. The Eleventh Circuit stated:

> The flaws of the *Covington* decision are that the Seventh Circuit implicitly used the market force theory to justify the pay disparity and that the Seventh Circuit ignored congressional intent as to what is a "factor other than sex." Consequently, we reject *Covington* because it ignores that prior salary *cannot* justify pay disparity.

(Pet. App. 9a). (Emphasis supplied).

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and two years before Glenn and Johns moved from salaried secretarial positions to "follow up" jobs. (R. 5-71-6-97; 6-108).

SUMMARY OF THE REASONS FOR GRANTING THE WRIT

This case involves an issue of national concern to employees and their employers. The Eleventh Circuit rejected as sexually discriminatory a widely used pay practice which enables employees to move from hourly jobs onto different career paths without economic loss. In condemning the practice at issue, the Eleventh Circuit created a clear analytical conflict with other circuits which have considered similar plans. Indeed, the Eleventh Circuit acknowledged that its decision directly conflicted with the Seventh Circuit's decision in *Covington v. Southern Illinois University*, 816 F.2d 317 (7th Cir. 1987). In addition, the Eleventh Circuit patently misapplied this Court's decision in *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974). The Court should review this case to establish uniformity on this issue of national importance.[4]

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[4] Moreover, the Court's ruling as to the applicable statute of limitations is in absolute conflict with this Court's recent decision in *McLaughlin v. Richland Shoe Company, Inc.*, 108 S.Ct. 1677 (1988), which had been argued but not yet decided when the court of appeals ruled. Thus, the Eleventh Circuit has, with this decision, extended the statute of limitations and expanded the liquidated damages provision of the Fair Labor Standards Act by improperly relying on the wholly discredited *Jiffy June* "in the picture" standard. *See Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139 (5th Cir.), *cert. denied*, 409 U.S. 948 (1972). The practical effect of the court's action is to eliminate the two tiered statutory damage scheme of the Fair Labor Standards, Equal Pay, and Age Discrimination in Employment Acts, which the Court has twice preserved in *TWA v. Thurston*, 469 U.S. 111 (1985) and *Richland Shoe*. For the reasons set forth in GM's petition, EEAC urges that the Court grant review of this issue as well.

REASONS FOR GRANTING THE WRIT

THE ANALYSIS EMPLOYED BY THE COURT OF APPEALS IS CONTRARY TO THE STATUTE AND CONFLICTS WITH THE ANALYSIS USED BY THIS COURT AND OTHER COURTS OF APPEALS AND ESSENTIALLY ELIMINATES THE "FACTOR OTHER THAN SEX" DEFENSE FROM THE EQUAL PAY ACT.

A. Other Courts Have Construed The "Factor Other Than Sex" Defense To Cover Income Maintenance Policies Similar To GM's Policy In This Case.

The Eleventh Circuit candidly acknowledged that its decision on the merits is in direct conflict with the Seventh Circuit's *Covington* decision. (Pet. App. 9a). The conflict merits resolution by this Court and goes beyond the patent conflict with the *Covington* result. The more serious conflict is between the method of analysis employed by the Eleventh Circuit and that used by this Court in *Corning Glass Works* and by other circuits which have addressed the issue. The proper analysis, rejected by the Eleventh Circuit, focuses on the legitimacy of the "business purpose" offered as justification for a pay disparity.[5]

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[5] Plaintiffs' case was based upon an alleged violation of the Equal Pay Act, 29 U.S.C. § 206(d). The Act provides in relevant part:

> (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to . . . (iv) *a differential based on any other factor other than sex* . . . . (Emphasis added).

Section 206(d)(1)(iv) presupposes that a disparity has been established as part of the plaintiffs' prima facie case and provides

By refusing to address the legitimacy of the business reasons offered by GM, the Eleventh Circuit has created confusion and conflict among the circuits. Here, the court did not find that the disparity was because of "sex"; it found only a disparity in income among certain men and certain women in a single job title among the universe of GM jobs. To rule such a disparity unlawful without addressing the business purpose underlying it is contrary to the statute.

"The factor other than sex exception [to the Equal Pay Act] was intended by Congress to be a 'broad general exception.'" *EEOC v. Maricopa County Community College District*, 736 F.2d 510, 514 (9th Cir. 1984), *citing Kouba v. Allstate Insurance Co.*, 691 F.2d 873, 877 (9th Cir. 1982). In *Kouba v. Allstate Insurance Co.*, a closely analogous case, that court of appeals recognized that "a factor used to effectuate some business policy is not prohibited simply because a wage differential results." 691 F.2d at 876.

Contrary to the Eleventh Circuit's holding below, numerous other decisions have recognized the legitimacy of wage maintenance policies adopted for a variety of reasons. This divergence of analysis is most clearly illustrated by *Covington v. Southern Illinois University*, 816 F.2d 317 (7th Cir. 1987), a decision which the Eleventh Circuit candidly acknowledged to be in conflict with its decision in this case. There, the employer paid a male replacement substantially more than the plaintiff for doing the same work. The male had been moved from another job within the University and allowed to retain his higher previous salary based on the university's policy

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"[t]hree specific . . . . and one broad general exception," so that "any discrimination based upon one of these exceptions shall be exempted" from the Act. H.R. Rep. No. 309, 88th Cong., 1st Sess. 3, *reprinted in* Staff of House Comm. on Education and Labor, Legislative History of the Equal Pay Act of 1963, 88th Cong. 1st Sess. 44 (1963).

"that a faculty member's change of assignment does not result in a decrease of salary." 816 F.2d at 319.

The Seventh Circuit rejected the plaintiffs' contention, here accepted by the Eleventh Circuit, that to qualify as a "factor other than sex," an employer's policy or practice must always be related to the requirements of the particular position. Instead, it concluded that:

> . . . SIU's salary retention policy qualified as a factor other than sex. We do not believe that the EPA precludes an employer from implementing a policy aimed at improving employee morale when there is no evidence that the policy is either discriminatorily applied or has a discriminatory effect.

816 F.2d at 322.

The Seventh Circuit also held that in establishing pay rates for transferred employees, the employer may legitimately consider their prior wages. It stated:

> In cases like the one before us, however, in which the wage policy of only the present employer is involved, any presumption of prior discrimination has no place. The present employer should be permitted to consider the wages it paid an employee in another position unless this policy is discriminatorily applied or unless there is evidence independent of the policy which establishes that the employer discriminates on the basis of sex. . . Maintenance of an employee's compensation in a transfer between positions is not in our view unusual and avoids the serious problem of "unmerited" pay reductions.

816 F.2d at 323.

Citing "flaws of the *Covington* decision" (Pet. App. 9a) the Eleventh Circuit rejected its reasoning and refused to approve GM's substantially identical policy.[6]

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[6] While *Covington* involved an intra-employer transfer within a unified salary plan, there is no conceptual distinction from the facts at hand. Here, the transfers were from a formalized hourly plan to a formalized salary plan, all within GM.

As the Seventh Circuit correctly pointed out, income maintenance policies are not "unusual"; indeed, courts have repeatedly found that such policies satisfy the "factor other than sex" defense by focusing on the underlying reasons rather than the result. *See e.g., Grove v. Frostburg National Bank*, 549 F. Supp. 922, 937 (M.Md. 1982) (policy of maintaining income levels when employees were transferred or their job assignments changed was neutral factor applied to all transferees); *Grossman v. Respiratory Home Care, Inc.*, 40 FEP Cases 122 (C.D. Cal. 1986); *Derouin v. Louis Allis Division, Litton Industrial Products, Inc.*, 618 F. Supp. 221, 225 (E.D. Wis. 1984) (employer may legitimately encourage "non-supervisory production employees with high wage rates to apply for supervisory positions without taking pay cuts, rather than having to start at the minimum supervisory rate.").[7]

While acknowledging the conflict with *Covington*, the court of appeals failed to point out that its decision was in direct conflict with many other decisions[8] and with

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[7] Although GM cited these cases to the courts below, neither court mentioned them in deciding either on the merits or in determining GM's asserted policy was "willful" and without reasonable foundation. Notably, the district court ignored these decisions, and also *Kouba v. Allstate*, when it found that GM had "chose[n] to ignore clear signs that its practices were illegal." (Pet. App. 38a).

[8] Other cases approving similar wage retention policies include: *Riordan v. Kempiners*, 831 F.2d 690, 699 (11th Cir. 1987); *Gosa v. Bryce Hospital*, 780 F.2d 917 (11th Cir. 1986); *Ciardella v. Carson City School Dist.*, 671 F.Supp. 699, 701 (D.Nev. 1987); *Blocker v. AT&T Technology Systems*, 666 F.Supp. 209, 214 (M.D.Fla. 1987) (Policy not based on sex and appears reasonable in order to enhance the desirability of employment and to provide security for employees); *Mangiapane v. Adams*, 20 FEP Cases 699 (D.D.C. 1979); *Hodgson v. Lenkurt Electric Co.*, 20 WH Cases 1044 (N.D. Cal. 1972); *EEOC v. Samedan Oil Corp.*, 29 Empl. Prac. Dec. (CCH) ¶ 32,901 (E.D. Okla. 1982); *Adams v. Univ. of Washington*, 722 P.2d 74 (Wash. Sup. Ct. 1986) (permissible to maintain wage rates of skilled employees in economic reorganization in order to mitigate

the clear legislative history of the Equal Pay Act.[9]

Unless this Court requires consideration of the underlying business purpose resulting in income disparities, lower federal courts will continue to be faced with con-

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effects of demoralizing wage adjustment during reassignment of job functions) *See, e.g., EEOC v. Aetna Insurance Co.*, 616 F.2d 719, 724-25 (4th Cir. 1980); *Bence v. Detroit Health Corp.*, 712 F.2d 1024, 1029-30 (6th Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984). *See also Hodgson v. Robert Hall Cloths, Inc.*, 473 F.2d 589, 594-96 (3d Cir. 1973), *cert. denied sub nom. Brennan v. Robert Hall Cloths, Inc.*, 414 U.S. 866 (1973).

[9] The Eleventh Circuit's decision below ignores the legislative history of the Act in at least one additional important respect. Both the circuit and district courts ruled below that the "factor other than sex" defense was not available to GM because the income maintenance policy was "not in writing" (Pet. App. 28a), was "merely one aspect of a practice" (Pet. App. 6a, 28a), and "the practice of individual decisionmakers" (Pet. App. 38a-39a, n.4). The legislative history of the Equal Pay Act makes it clear that unwritten practices also qualify for the defense.

A colloquy between Representative Griffin, a principal proponent of the Act, and Representative Fountain explains that point:

> Mr. Fountain: . . . I just wanted to be sure that an employer does not have to have some written or otherwise well-defined system.
>
> Mr. Griffin: I do not think this necessarily means a formal system . . . as long as there is actually a practice or a system that is not based on sex. It may be a practice that has not been reduced to writing.

109 Cong. Rec. 8692 (1963).

An exchange between Representatives Waggoner and Goodell further illustrates the point:

> Mr. Goodell: That [a writing] is obviously not required in order to fit under the exceptions. If . . . there is [a] system or practice . . . based on any factor or factors other than sex, then the system or practice is all right, whether or not it has ever been described in writing.

109 Cong. Rec. 8696-97 (1963).

flicting authorities as to the proper analysis for judging the "factor other than sex" defense, and employers such as GM, whose policies span the circuits, will be placed in an impossible dilemma of having substantial legal support for their policies, yet facing the onus of having to commit a "willful" violation in the Eleventh Circuit if they decide to apply the same pay policies there that they may lawfully maintain in other parts of the country.

If not reversed, the impact of the circuit court's opinion on employment opportunities will be enormous. Employers with income maintenance policies will have to abandon them if they do business in the Eleventh Circuit. The impact will fall heaviest on those employees whose economic position will not allow them to reduce income in order to change career paths.

B. The Court of Appeals Misapplied This Court's *Corning Glass* Decision So As To Improperly Condemn Sex-Neutral, Legitimate Wage Retention Policies.

The Eleventh Circuit simply misapplied this Court's decision in *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974). The court erroneously stated that GM sought "to defend the pay disparity as a result of the market force theory." (Pet. App. 7a). By using that inapt label rather than *Corning's* analysis, the court twisted the logic of *Corning Glass* to virtually repeal the "factor other than sex" exemption. In doing so, moreover, it created additional conflicts with the decisions of the other courts which have addressed income maintenanance policies.

The "market force" theory was never advanced by GM. This discredited theory posited that women could be paid less "because women were willing to accept lower salaries as they could not command higher salaries elsewhere." *Brock v. Georgia Southwestern College*, 765 F.2d

1026, 1037 (11th Cir. 1985), cited on this point at Pet. App. 7a. As the *Brock* decision correctly explained:

> Indeed, the argument that supply and demand dictates that women *qua* women may be paid less is exactly the kind of evil that the Act was designed to eliminate, and has been rejected. *See Corning Glass Works*, 417 U.S. at 205.

765 F.2d at 1037.

GM instead argued to the Eleventh Circuit that its policy is the antithesis of a sex-based policy paying women less because women will work for less:

> The [district] court did not find, nor was there any evidence that the Salary Administration Plan and the collectively bargained hourly pay plan are other than sex neutral. Male and female salaried employees are subject to the same salary plan and transfer from salaried job to salaried job in the same manner. (R. 6-98). The same is equally true for the hourly system. (R. 6-98-99).
>
> * * * *
>
> [T]he practice was applied in a sex neutral fashion and resulted in hourly females transferring to salaried jobs at incomes higher than both incumbent males (R. 6-99-100) and females (R. 6-100-101). By the same token, men who have transferred from one salaried job to another have found themselves, as did [Sheila] Glenn and [Patricia] Johns, making less than female incumbents who had previously transferred from hourly jobs. (R. 6-100, 102-103).

GM Br. to the Eleventh Circuit at 8-9.

Thus, GM never advanced a "market rate" defense. It followed, and argued that it followed, a sex-neutral practice that resulted in this instance in female follow-up workers being paid less than males in one particular job category. In other instances, as a result of its practice, males in salaried jobs were paid less than females for exactly the same reason.

Indeed, the "market force" theory condemned by *Corning* could not be applied if it were available. In both *Corning* and *Georgia Southwestern* there existed separate male and female "markets" from which the employer could choose. In each case, the source markets made labor available at distinct and sexually driven rates. Here, there is a unitary "source" of uniformly compensated hourly paid employees. GM's income maintenance policy is sex neutral and applied across-the-board to both male and female employees. Neither court below found that either the policy itself, or the prior wages, or the salary plan were sexually discriminatory. In light of the evidence, those findings could not be made. (See Deft. Ex. 1).

The legitimacy of GM's "business policy" and the end it is designed to reach were not considered. Instead, the court erroneously seized upon *Corning* without explanation.

The Eleventh Circuit's misuse of the *Corning Glass* decision confuses the law governing the "factor other than sex defense." The confusion and misapplication is patent. Originally, the Corning plants in question only operated during the day, and "all inspection work was performed by women." 417 U.S. at 190. When night operations began, the male workers assigned to night inspection work demanded and were given a higher wage to perform "demeaning" women's work (417 U.S. at 204). After the Equal Pay Act was passed, Corning equalized the pay for daytime and nighttime inspectors' jobs, but "red circled" the higher wages of male inspectors hired prior to the new collective bargaining agreement, intentionally perpetuating the now-illegal, sex-based differential. 417 U.S. at 194. As this Court noted, focusing on the origin of the disparity:

> The differential arose simply because men would not work at the low rates paid women inspectors, and

> it reflected a job market in which Corning would pay women less than men for the same work. That the company took advantage of such a situation may be understandable as a matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work.

417 U.S. at 205.

Here, there was no showing, as in *Corning*, that GM's prior rates were the result of unlawful discrimination. The only similarity is that here, and in *Corning*, there was a wage retention policy that resulted in a disparity. That alone proves nothing. The "market theory" factor rejected in *Corning Glass* simply does not aply to the instant case.[10]

Rather than analyze GM's business purpose of encouraging hourly-to-salaried transfers, the Eleventh Circuit focused only on the pay disparity and adopted the convenient but inapt "market force" label of *Corning Glass*. In *Corning Glass* the illegal business purpose was the perpetuation of unlawful, sexually predicated distinctions. No such illegal distinctions have been shown in the instant case. Had the Eleventh Circuit properly utilized the *Corning Glass* analysis, it would have reversed the district court. Instead, it misread *Corning* to create a *per se* violation. The clear misapplication of *Corning*

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[10] Numerous other courts have held that where the income level being preserved is not itself discriminatory, it does not violate the Equal Pay Act to maintain that income when employees are transferred to other jobs for legitimate business reasons. *See e.g.*, *Mangiapane v. Adams*, 20 FEP Cases 699, 700 (D.D.C. 1979) (distinguishing *Corning Glass*); *Covington v. Southern Illinois University*, 816 F.2d at 322 (no violation where prior salary not discriminatory); *Kouba v. Allstate Insurance Co.*, 691 F.2d at 876 (same); *Riordan v. Kempiners*, 831 F.2d 690 (distinguishing *Corning Glass*, where previous classification was itself due to sexual discrimination); and *Derouin v. Louis Allis Div.*, 618 F.Supp. at 225.

Glass makes this case appropriate for Supreme Court review.[11]

CONCLUSION

For the foregoing reasons and the reasons set forth in the petition, the amicus respectfully urges This Court to grant the petition herein, issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit, and review this case in the manner set forth in the petition of General Motors Corporation.

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October 17, 1988

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[11] The cases relied on by the Eleventh Circuit are inapposite because they found that the "market theory" cannot be used to justify *sex-based* wage policies. *See Brennan v. City Stores, Inc.*, 479 F.2d 235, 241 n.12 (5th Cir. 1973) (wage differential improperly justified on the basis of the tighter market for salesmen and male tailors); *Hodgson v. Brookhaven General Hospital*, 436 F.2d 719, 726 (5th Cir. 1970) (no defense that the employer's bargaining power is "greater with respect to women than with respect to men"); *Brennan v. Victoria Bank and Trust Company*, 493 F.2d 896, 902 (5th Cir. 1974) (no defense that "a woman will work for less than a man"); *Brock v. Georgia Southwestern College*, 765 F.2d at 1037 (no market defense where "those charged with hiring did not inform themselves of the market rates of particular expertise, experience, or skills."). It is clear that GM followed a sex neutral income maintenance policy and so argued to the courts below. "Market theory" cases of this type have no bearing to the facts of this case.